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90-405

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

IN RE: DAVID LARRY DAVIS, DEBTOR,

CHARLES A. GOWER, TRUSTEE,

Petitioner,

v.

FARMERS HOME ADMINISTRATION,

Respondent.

ON WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Is a trustee in bankruptcy who otherwise qualifies for an award of costs and attorney's fees under the Equal Access to Justice Act a "party" eligible for an award of fees under the Act?

LIST OF PARTIES

The parties to the proceedings below were Petitioner, Charles A. Gower, Trustee, and Respondent, Farmers Home Administration.

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OPINIONS BELOW

The ruling of the bankruptcy court, dated September 23, 1988, has been officially reported, In re Davis, 91 B.R. 627 (Bankr. M.D. Ga. 1988), and is reproduced in the Appendix beginning at A-42. The decision of the district court, dated March 2, 1989, appears in the Appendix beginning at A-38. And the opinion of the Eleventh Circuit Court of Appeals, dated April 30, 1990, which has been officially reported, In re Davis, 899 F.2d 1136 (11th Cir. 1990), is set forth in the Appendix beginning at A-1.

JURISDICTION

The decision of the Eleventh Circuit Court of Appeals was rendered on April 30, 1990. The Eleventh Circuit denied Petitioner's request for rehearing on June 20, 1990. The jurisdiction of this

Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 1651.

STATUTES INVOLVED

28 U.S.C. § 2412 provides that a private party who prevails in an action against the United States or any of its agencies is eligible to recover costs and attorney's fees unless it appears that the position of the United States was substantially justified. The statute defines the term "party" as follows:

> "[P]arty" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26

> U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association[.]

28 U.S.C. § 2412(d)(2)(B).

STATEMENT OF THE CASE

David Larry Davis, a farmer, borrowed $985,000 from the Farmers Home Administration ("FmHA") in 1981. It was later determined that Davis defrauded FmHA in obtaining this loan, and he pleaded guilty to federal fraud charges under 18 U.S.C. § 1014 on May 12, 1983. On November 16, 1981, Davis filed a bankruptcy petition under Chapter 7 of the Bankruptcy Code. On February 12, 1982, Petitioner brought an adversary action against FmHA to set aside certain preferential payments made to FmHA during the

90-day period prior to Davis's Chapter 7 petition. Petitioner also sought to have FmHA's claims against Davis's estate equitably subordinated to those of other creditors. After rejecting FmHA's claim of sovereign immunity from Petitioner's action, see In re Davis, 20 B.R. 519 (Bankr. M.D. Ga. 1982), the bankruptcy court, on November 13, 1984, ruled in favor of Petitioner, ordering the return of the preferential transfers and equitably subordinating FmHA's claims to those of Davis's other creditors. The court found that FmHA's conduct toward the other creditors was "at best, misleading," and that "FmHa obtained an unfair advantage over the other unsecured creditors in this case." On December 12, 1984, the Trustee filed a timely application in the bankruptcy court for attorney's fees under § 2412(d)(1)(A) of the

Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) ("EAJA"). This application was stayed, however, when FmHA appealed to the district court.

The district court reversed the bankruptcy court on July 10, 1985, ruling that Petitioner's claim was forfeited under 28 U.S.C. § 2514 because of Davis's admitted fraud against FmHA. The Eleventh Circuit Court of Appeals, in turn, reversed the district court, ruling that because Petitioner's action was on behalf of the other creditors, the bankrupt debtor's fraud was irrelevant. In re Davis, 785 F.2d 926 (11th Cir. 1986).

On November 5, 1986, the district court, on remand, affirmed the bankruptcy court's decision of November 13, 1984. On September 23, 1987, the Eleventh Circuit summarily affirmed the district court.

Petitioner then renewed his EAJA application in the bankruptcy court on January 4, 1988, and a hearing was held on February 25, 1988. FmHA objected to any award of attorney's fees on the grounds that (1) the Trustee was not an eligible "party" to recover fees under the EAJA; (2) the Trustee did not qualify under the EAJA's net-worth limitations; (3) FmHA was substantially justified in its position; and (4) special circumstances (in particular, Davis's fraud) made an award of fees unjust. On September 23, 1988, the bankruptcy court overruled FmHA's objections and awarded a total of $112,638.75 in attorneys' fees and $631.56 in expenses to Petitioner and his two co-counsel. In re Davis, 91 B.R. 627 (Bankr. M.D. Ga. 1988). The court found, inter alia, that a bankruptcy trustee was a "party" eligible to receive

an EAJA award and that the EAJA's net worth and number-of-employees limitations were satisfied because the Chapter 7 estate was insolvent. Id. at 632-33.

FmHA appealed to the district court, which affirmed the bankruptcy court's fee award on March 2, 1989. The district court, citing Davis's fraud against FmHA, expressed in dicta the opinion that FmHA's position was substantially justified and that special circumstances made an award of attorney's fees to Petitioner unjust. The district court concluded, however, that its views on those issues were precluded by the Eleventh Circuit's reversal of its July 10, 1985 decision. The district court did not discuss the EAJA eligibility issues concerning Petitioner, but its disposition of the case implicitly affirmed the bankruptcy court's holdings on those issues.

FmHA thereafter appealed to the Eleventh Circuit, which reversed the district court. In re Davis, 899 F.2d 1136 (11th Cir. 1990). The Eleventh Circuit's ruling was premised on two grounds. First, it held that the bankruptcy court, not being an Article III court, lacked the jurisdiction to award fees under the EAJA. Id. at 1138-42. Second, it held that a trustee in bankruptcy is not a "party" eligible to recover fees under the EAJA. Id. at 1142-45. Only the second of these two issues is before this Court.[1]

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[1]The Eleventh Circuit acknowledged that, because the district court had upheld the bankruptcy court's fee award, and because the district court, as an Article III court, does possess jurisdiction to award fees under the EAJA, reversal on the first ground would be academic only. 899 F.2d at 1142-43 & n.14. Accordingly, the second basis for reversal, which raises the issue that Petitioner seeks to have this Court address, is in reality the sole dispositive question in the case.

The Eleventh Circuit held that a bankruptcy estate is not an "organization" within the purview of 28 U.S.C. § 2412(d)(2)(B) because a bankruptcy estate has only a transient existence, and because the members of the alleged "organization"--i.e., the creditors--often have antagonistic interests. Id. at 1144. The court also held that, because creditors are the real parties in interest in a Chapter 7 proceeding, it is their financial status and their labor force which should be considered in ascertaining whether the net worth and employee limitations contained in 28 U.S.C. § 2412(d)(2)(B)(ii) have been satisfied. Id. at 1144-45 n.18. The court remarked that it was "unclear how the EAJA eligibility requirements of a bankruptcy trustee would be determined where some creditors satisfied those standards and

others did not[,]" and added that "[o]ne virtue of a holding excluding bankruptcy trustees from the scope of EAJA eligibility . . . is that it obviates such an inquiry." Id. at 1145 n.18.

REASONS FOR GRANTING THE WRIT

I. A REFUSAL TO CLASSIFY A TRUSTEE AS A PARTY ELIGIBLE FOR AN AWARD OF FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT IMPAIRS THE PROPER FUNCTIONING OF THE BANKRUPTCY CODE.

The Eleventh Circuit's holding in the present case conflicts with the Bankruptcy Code in several ways. First, it ignores the fact that a bankruptcy estate has all the relevant attributes of entities which no one would gainsay qualify as organizations. Consider, for example, what is probably the archetypal form of organization in American society, the corporation. Corporations can exist for indefinite durations, but they may also

last for as short a period of time as the articles of incorporation specify. 8 W. Fletcher, Cyclopedia of the Law of Private Corporations § 4081 (1982). Hence there is no reason why a corporation could not be formed, say, simply to hold an asset for a brief interval for tax purposes. Yet the corporation's short life span--its "transience," to borrow the phraseology of the Eleventh Circuit --would not make it any less a corporation.

Nor does antagonism among the members of a corporation--its shareholders --detract from its corporate status. One of the most fecund sources of business litigation in this country, indeed, is infighting among corporate shareholders. Thus neither of the attributes ascribed by the Eleventh Circuit to a bankruptcy estate is a sound basis for concluding

that a bankruptcy estate is not an organization. To the contrary, the Eleventh Circuit's holding flies in the face of reality, of the practical functioning of Chapter 7 proceedings wherein the unsecured creditors, whatever their individual differences, band together to maximize the assets of the estate, just as shareholders band together to maximize corporate assets.

Another manner in which the holding below deviates from practice under the Bankruptcy Code, and frustrates its purposes, is in its mistaken view that the wealth or size of creditors has a bearing on the resources of the estate. A trustee, and attorneys hired by him, are paid from the estate, not by the creditors. 11 U.S.C. § 330. It is true, of course, as the Eleventh Circuit observed, see In re Davis, 899 F.2d 1136, 1145 n.18 (11th

Cir. 1990), that these expenses ultimately reduce the payout available to the creditors, but that is a far cry from the conclusion that the wealth of creditors is effectively the wealth of the estate. A hypothetical will illustrate the fallacy of this assumed equivalence. Imagine an individual with $50,000 in assets who purchases a Chevrolet on credit from the General Motors Acceptance Corporation. If that individual files for a Chapter 7 bankruptcy while still in debt to General Motors, the trustee would then have available to him, according to the Eleventh Circuit's logic, all the wealth of General Motors. Clearly that is not so. When the debtor's assets are exhausted, no funds remain to pay the trustee, regardless of how well-heeled the creditors happen to be.

By overstating the assets available

to pay a trustee's attorney's fees, the Eleventh Circuit effectively undermines the Bankruptcy Code's policy of rewarding attorneys as a means of encouraging efforts to maximize the estate:

> [I]n bankruptcy very often futile quests for assets have to be made. Many times, however much ingenuity and time attorneys may expend, they may not be able to get anything for the estate by their efforts. It is then a question, as in salvage at sea, of no cure, no pay.
>
> When the efforts of attorneys cause a material increase in the bankruptcy estate, or, as here, create it, they should be well rewarded; otherwise there will not be any incentive to attorneys to put forth their best efforts in cases which appear unpromising.

In re Osofsky, 50 F.2d 925, 927 (S.D.N.Y. 1931).

Moreover, even assuming that the size and wealth of creditors were a relevant consideration, the Eleventh Circuit has fashioned a blanket rule that flatly

prohibits the recovery of attorney's fees by trustees in bankruptcy.[2] Thus, even where a debtor and all his creditors satisfy the net worth and number-of-employee conditions of 28 U.S.C. § 2412(d)(2)(B)(ii), and even where the United States position is found not to have been substantially justified, the Eleventh Circuit would still deny an award of fees to a prevailing trustee. This further tends to erode the financial incentive necessary to make the role of the trustee effective. In re Osofsky, supra.

Finally, the Eleventh Circuit's rationale would deny EAJA fees to a Chapter 7 trustee, while allowing them to a Chapter 7 debtor. See In re Esmond, 752 F.2d 1106 (5th Cir. 1985) (holding that a

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[2]The Eleventh Circuit expressly noted that its analysis ignored the financial condition and the size of corporate creditors. 899 F.2d at 1145 n.18.

Chapter 7 debtor is eligible to receive EAJA fees); In re Armstead, 106 B.R. 405 (Bankr. E.D. Pa. 1989) (same). The objections raised by the Eleventh Circuit in the present case, after all, would not affect a debtor. Imagine what would have occurred if, instead of Petitioner having been appointed trustee of David Davis's estate, Davis himself had been placed in charge of the estate. As an individual with less than two million dollars in net assets, he would clearly have qualified under 28 U.S.C. § 2412(d)(2)(B)(i) as an eligible "party" for purposes of the EAJA. In re Esmond, supra; In re Armstead, supra. But Petitioner, as trustee of Davis's estate, has been held ineligible.

The foregoing distinction makes no sense, for the powers and responsibilities of debtors in possession are identi-

cal to those of trustees. Koch Refining v. Farmers Union Central Exchange, Inc., 831 F.2d 1339, 1342 & n.3 (7th Cir. 1987), cert. denied, 485 U.S. 906 (1988); In re Tudor Associates Ltd., II, 64 B.R. 656, 662 (E.D.N.C. 1986). The Eleventh Circuit's decision here, in other words, places a special and irrational disadvantage on trustees, a disadvantage which perforce undermines their ability to discharge their responsibilities under the Bankruptcy Code.

II. A REFUSAL TO CLASSIFY A TRUSTEE AS A PARTY ELIGIBLE FOR AN AWARD OF FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT UNDERMINES THE PURPOSES OF THE ACT.

The EAJA has two purposes--(1) to reduce the financial disincentives for private citizens to challenge unjustified governmental conduct; and (2) to deter the government from engaging in unjusti-

fied conduct in the first place. Oguachuba v. Immigration & Naturalization Service, 706 F.2d 93, 98 (2d Cir. 1983). Where questions of statutory interpretation arise under the EAJA, it is imperative that these purposes be borne in mind. Winold, "Institutionalizing an Experiment: The Extension of the Equal Access to Justice Act--Questions Resolved, Questions Remaining," 14 Fla. St. U.L. Rev. 925, 947 (1987). In particular, the expanse of the term "party" should be broadly construed in order fully to effectuate the twin goals of the Act. Hill, "An Analysis and Explanation of the Equal Access to Justice Act," 19 Ariz. St. L.J. 229, 243-44 (1987).

The Eleventh Circuit's ruling in the case at bar, however, frustrates the purposes of the EAJA, for it restores the very imbalance which the Act was intended

to eliminate. Consider the plight faced by the owner of a fledgling company in debt to the Small Business Administration. If the SBA suddenly decided, with no justification whatsoever, to accelerate the debt and demand full payment at once, the owner might very well have to declare bankruptcy. But if a trustee were appointed, the trustee would find himself, under the Eleventh Circuit's ruling here, hard pressed to mount a vigorous challenge to the SBA's arbitrary conduct, for the attorney's fees involved might very well exhaust the assets of the estate, thereby rendering any victory a pyrrhic one indeed.

Moreover, consider the same situation from the standpoint of the SBA. Where is the deterrence? Not only has the deterrent effect of the EAJA vanished, but the Eleventh Circuit's ruling

actually encourages unfair administrative action. Suppose, for example, the owner of our hypothetical fledgling business were not insolvent, but nonetheless in a severely weakened financial condition as a result of the SBA's debt acceleration. If the owner were to sue the SBA at that juncture, he would be entitled to EAJA fees. But if, by engaging in further unfair conduct (say, causing other creditors to accelerate), it could force him into bankruptcy and then, as a creditor, demand the appointment of a trustee, the SBA would entirely evade the EAJA. The message which the Eleventh Circuit's ruling sends to administrative officials, in short, is when you find that you have unfairly placed a citizen out on a limb, don't give him a hand; give him a push. It is difficult to envision a result more fundamentally at odds with the purposes

of the Act.

III. CERTIORARI IS NEEDED IN ORDER TO RESOLVE A CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL.

This Court has on prior occasions granted certiorari in order to resolve conflicts among the courts of appeal concerning the interpretation of the EAJA. See, e.g., Pierce v. Underwood, 481 U.S. 1047 (1987). Certiorari should be granted in the case at bar for precisely that reason, for there exists a conflict between the Fifth and the Eleventh Circuit Courts of Appeal concerning the issue presented herein.

In the case at bar, the Eleventh Circuit held that a trustee in bankruptcy is not a party eligible for an award of fees under the EAJA.

The Fifth Circuit has held otherwise. In Moody v. United States, 783

F.2d 1244 (5th Cir. 1986), the plaintiff had commenced an action against the United States to recover the proceeds of a postal insurance policy. After the action was filed, the plaintiff went into bankruptcy, and a trustee took over the lawsuit, including the appeal. Id. at 1245 n.1. The district court had denied the trustee's request for costs and attorney's fees under the EAJA. The Fifth Circuit reversed and remanded, holding that if the plaintiff himself would have qualified as an eligible party under the EAJA, then fees should be awarded. Id. at 1247.

To like effect is In re Estate of Lee, 812 F.2d 253 (5th Cir. 1987), rev'g Hill v. National Flood Insurance Program, No. H-83-7013 (S.D. Tex. Jan. 23, 1986). The district court in that case had awarded EAJA fees to a trustee in bank-

ruptcy. The Fifth Circuit reversed, holding that the amount of the award had been miscalculated. It remanded with directions that the fees be recalculated in conformity with the EAJA and, as thus recalculated, awarded to the trustee. 812 F.2d at 257.

In In re Esmond, supra, the Fifth Circuit held that Chapter 7 debtors were eligible for an award of EAJA fees. As was pointed out in Part I of this Petition, there is no practical difference whatsoever between an award of EAJA fees to a Chapter 7 debtor, and an award to a Chapter 7 trustee. Thus the Esmond decision further demonstrates the divergence between the Fifth and the Eleventh Circuits concerning the issue presented herein.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Court should issue a writ of certiorari in order to resolve whether a trustee in bankruptcy is a party eligible for an award of fees under the EAJA.

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari were served upon counsel of record by posting the same in the United States mail, postage prepaid, this 31 day of August 1990.

CHARLES A. GOWER

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

IN RE: DAVID LARRY DAVIS, DEBTOR,

CHARLES A. GOWER, TRUSTEE,

Petitioner,

v.

FARMERS HOME ADMINISTRATION,

Respondent.

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APPENDIX

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In re David Larry Davis, Debtor.

Charles A. Gower, Trustee,
Plaintiff-Appellee,

v.

FARMERS HOME ADMINISTRATION,
Defendant-Appellant.

No. 89-8359.

United States Court of Appeals,
Eleventh Circuit.

April 30, 1990.

Before JOHNSON and ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JOHNSON, Circuit Judge:

The Farmers Home Administration ("FmHA") appeals from the district court's affirmance of the bankruptcy court's award of attorney's fees to Charles A. Gower, the Trustee of the Bankruptcy Estate of David Larry Davis, under the Equal Access to Justice Act, 28 U.S.C.A. § 2412 (West Supp.1989) ("EAJA").

I. STATEMENT OF THE CASE

Davis, a farmer, borrowed $985,000 from FmHA in 1981. It was later determined that Davis defrauded FmHA in obtaining this loan, and he pleaded guilty to federal fraud charges under 18 U.S.C.A. § 1014 on May 12, 1983. On November 16, 1981, Davis filed a bankruptcy petition under Chapter 7 of the Bankruptcy Code, 11 U.S.C.A. §§ 701-766 (West 1979 & Supp.1989). On February 12, 1982, the Trustee brought an adversary action against FmHA to set aside certain preferential payments made to FmHA during the 90-day period prior to Davis's Chapter 7 petition. See 11 U.S.C.A. § 547(b), (c)(5) (West 1979 & Supp. 1989). The Trustee also sought to have FmHA's claims against Davis's estate equitably subordinated to those of other creditors. See 11 U.S.C.A. § 510(c) (West 1979). After rejecting FmHA's claim of sovereign

immunity from the Trustee's action, see In re Davis, 20 B.R. 519 (Bkr.M.D. Ga. 1982), the bankruptcy court, on November 13, 1984, ruled in favor of the Trustee, ordering return of the preferential transfers and equitably subordinating FmHA's claims to those of Davis's other creditors. The court found that FmHA's conduct toward the other creditors was "at best, misleading," and that "FmHA obtained an unfair advantage over the other unsecured creditors in this case." On December 12, 1984, the Trustee filed a timely application in the bankruptcy court for attorney's fees under section 2412(d)(1)(A) of the EAJA; this application was stayed, however, when FmHA appealed to the district court.[1]

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[1] Although technically premature because the bankruptcy court's judgment had not yet become nonappealable (and, as noted, actually was appealed), see 28 U.S.C.A. § 2412(d)(2)(G), the Trustee's EAJA application under these circumstances was nonetheless timely. See

The district court reversed the bankruptcy court on July 10, 1985, ruling that the Trustee's claim was forfeited under 28 U.S.C.A. § 2514 because of Davis's admitted fraud against FmHA. This Court reversed the district court, ruling that because the Trustee's action was on behalf of the other creditors, the bankrupt debtor's fraud was irrelevant. In re Davis, 785 F.2d 926, 927 (11th Cir. 1986).[2] On November 5, 1986, the district court, on remand, affirmed the bankruptcy court's decision of November 13, 1984. On September 23, 1987, this

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James v. Department of Housing and Urban Dev., 783 F.2d 997, 998-99 & n.2 (11th Cir.1986); see also Martindale v. Sullivan, 890 F.2d 410, 413 n.5 (11th Cir.1989).

[2]This Court also held that 28 U.S.C.A. § 2514 applied only to actions in Claims Court, and not to actions in bankruptcy and district court for more than $10,000. See 28 U.S.C.A. § 1346(a)(2) (West Supp.1989) (concurrent jurisdiction of district court and Claims Court over claims under $10,000); Davis, 785 F.2d at 927 & n. 4.

Court summarily affirmed the district court under 11th Circuit Rule 36-1. The Trustee renewed his EAJA application in the bankruptcy court on January 4, 1988, and a hearing was held on February 25, 1988. FmHA objected to any award of attorney's fees on the grounds that (1) the Trustee was not an eligible "party" to recover fees under the EAJA, see 28 U.S.C.A. § 2412(d)(2)(B), (2) the Trustee did not qualify under the EAJA's net-worth limitations, see id., (3) FmHA was substantially justified in its position, see id., § 2412(d)(1)(A), and (4) special circumstances (in particular, Davis's fraud) made an award of fees unjust, see id. On September 23, 1988, the bankruptcy court overruled FmHA's objections and awarded a total of $112,638.75 in attorneys' fees and $631.56 in expenses to the Trustee and his two co-counsel, T. Jef-

ferson Loftiss, II, and J. Patrick Ward.[3] In re Davis, 91 B.R. 627, 638 (Bkr.M.D. Ga. 1988). The court found, inter alia, that a bankruptcy trustee was an eligible "party" to receive an EAJA award and that the EAJA's net-worth and number-of-employees limitations were satisfied because the Chapter 7 estate was insolvent. Id. at 632-33.

FmHA appealed to the district court, which affirmed the bankruptcy court's fee award on March 2, 1989. The district court, citing Davis's fraud against FmHA, expressed in dicta the opinion that FmHA's position was substantially justified and that special circumstances made an award of attorney's fees to the Trustee unjust. The district court concluded, however, that its views on those

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[3]The Trustee in this case is an attorney and performed the bulk of the legal work on behalf of the estate himself.

issues were precluded by this Court's reversal of its July 10, 1985 decision. The district court did not discuss the EAJA eligibility issues concerning the Trustee, but its disposition of the case implicitly affirmed the bankruptcy court's holdings on those issues. The FmHA thereafter appealed to this Court, raising the four issues noted above,[4] and also contending, for the first time, that the bankruptcy court lacked jurisdiction to award attorney's fees under the EAJA.[5] The two issues which we address are questions of law subject to de novo review.

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[4]For reasons discussed below, see notes 14 and 18, infra, we do not reach the latter three issues noted above.

[5]It is well established that this Court will address a jurisdictional issue on appeal even though never previously raised. See Simanonok v. Commissioner of Internal Revenue, 731 F.2d 743, 744 (11th Cir.1984).

II. ANALYSIS

A. Jurisdiction

The EAJA states simply that attorney's fees are awardable by "a court . . . in any civil action . . . brought by or against the United States in any court having jurisdiction of that action." 28 U.S.C.A. § 2412(d)(1)(A); see also id., § 2412(b). FmHA does not contest that the bankruptcy court had jurisdiction over the voidable-preference/equitable-subordination action brought by the Trustee in this case. See 28 U.S.C.A. § 157(b)(2)(F), (O) (West Supp. 1989). It thus must appear, ipso facto, that the bankruptcy court had jurisdiction to entertain the Trustee's EAJA application. This Court, however, in Bowen v. Commissioner of Internal Revenue, 706 F.2d 1087 (11th Cir.1983), held that despite the EAJA's reference to "any court having jurisdiction of th[e] ac-

tion," only "court[s] of the United States" as defined in 28 U.S.C.A. § 451 --that is, courts whose judges enjoy the characteristics of tenure "during good behavior" and irreducible salary provided by Article III of the Constitution--have jurisdiction to award fees under the EAJA.[6] See Bowen, 706 F.2d at 1088

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[6]When the EAJA was enacted in 1980, § 451 provided, in relevant part:

> As used in this title:
>
> The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

Effective November 1, 1980, § 451 was amended to redesignate the Customs Court as the Court of International Trade. Effective October 1, 1982, § 451's references to the Court of Claims and the Court of Customs and Patent Appeals were deleted, reflecting the merger of those courts into the new Court of Appeals for

("[W]e conclude that Section 2412(d)(1)(A) authorizes an award of attorney's fees only by an Article III court.").

The specific holding in Bowen was that the non-Article III Tax Court lacked jurisdiction to award EAJA fees. See id. (noting that a Senate co-sponsor of the EAJA specifically contemplated that EAJA fees would be available in "tax-related matters" before the district courts but not "before the Tax Court"). The language of Bowen, however, unambiguously controls the jurisdictional issue presented in this case. Furthermore, the legislative history of the EAJA states:

> Section 2412(b) permits a court in its discretion to award attorney fees and other expenses to prevailing parties in civil litigation involving the United States to the same

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the Federal Circuit and the creation of the new, non-Article III Claims Court. See Federal Courts Improvement Act of 1982, P.L. 97-164, 96 Stat. 25, codified in part at 28 U.S.C.A. §§ 171-177, 1295 (West Supp.1989).

> extent it may award fees in cases involving other parties. The courts so empowered are those defined in section 451 of title 28, United States Code. This is consistent with the present law in section 2412.

H.R.Rep. No. 96-1418, 96th Cong., 2d Sess. 17, reprinted in 1980 U.S.Code Cong. & Admin.News 4953, 4984, 4996 (emphasis added). The language of section 2412(d)(1)(A) is identical in relevant respects to that of section 2412(b), and the House Report does not suggest any different definition of the courts empowered to award fees under section 2412(d)(1)(A). See id. at 18, 1980 U.S. Code Cong. & Admin.News at 4997.[7] Bank-

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[7]The Federal Circuit, in Essex Electro Engineers, Inc. v. United States, 757 F.2d 247, 250-52 (Fed.Cir.1985), declined to follow Bowen and ruled that the new, non-Article III Claims Court had jurisdiction to award EAJA fees. The Federal Circuit, discounting the legislative history cited above, relied in part on the fact that the Federal Courts Improvement Act of 1982 ("FCIA") provided that any matters pending before the trial commissioners of the former, Article III Court of Claims on October 1, 1982 (the

effective date of the FCIA) should be determined by the new Claims Court, which inherited the trial jurisdiction of the Court of Claims. See Essex Electro, 757 F.2d at 252; FCIA, P.L. 97-164, § 403(d), 96 Stat. 25, 58; see also Ellis v. United States, 711 F.2d 1571, 1574-75 (Fed.Cir.1983). On August 5, 1985, five months after Essex Electro was decided on February 25, 1985, Congress, in the course of permanently reenacting certain portions of the EAJA which had expired, amended the EAJA to provide that "'court' includes the United States Claims Court." See P.L. 99-80, § 2(c)(2), codified at 28 U.S.C.A. § 2412(d)(2)(F). The legislative history of this amendment notes the intervening enactment of the FCIA and states that "[s]ince some question has been raised about the jurisdiction of the U.S. Claims Court to make [EAJA] awards . . . this amendment clarifies the jurisdictional issue, and codifies existing law." H.R.Rep. No. 99-120(I), 99th Cong., 1st Sess. 17-18, reprinted in 1985 U.S.Code Cong. & Admin.News 132, 146 (citing the Federal Circuit's Ellis decision). The extension of EAJA jurisdiction to the Claims Court thus appears to have been a particularized response to the transitional problems created by the FCIA. Congress's failure to make any similar clarifying amendment with regard to the Tax Court or the bankruptcy courts supports the continuing vitality of Bowen.

We note that at least two cases from other circuits have assumed without discussion that a bankruptcy court has jurisdiction to award EAJA fees. See Matter of Esmond, 752 F.2d 1106 (5th Cir.1985)

ruptcy courts are not listed in section 451, and it is indisputable that, as presently constituted, they are not Article III courts. See Northern Pipeline Construction Co. v. Marathan Pipe Line Co., 458 U.S. 50, 60-61, 102 S.Ct. 2858, 2865-66, 73 L.Ed.2d 598 (1982) (plurality opinion of Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.);

(reversing bankruptcy court's denial on the merits of an EAJA application and remanding case to bankruptcy court for possible award of EAJA fees); In re Hagan, 44 B.R. 59, 65 (Bkr. D.R.I.1984) (awarding EAJA fees). It appears that the jurisdictional issue was simply never raised in either of these cases. We also note that limiting EAJA jurisdiction under § 2412 to Article III courts is somewhat incongruous, given the fact that the administrative version of the EAJA, enacted at the same time as § 2412, see P.L. 96-481, § 203, 94 Stat. 2321, 2325-27 (1980), codified at 5 U.S.C.A. § 504 (West Supp.1989), authorizes fee awards by any "agency that conducts an adversary adjudication." 5 U.S.C.A. § 504(a)(1). This Court remains bound by the panel decision in Bowen, however, until and unless it is modified by the Supreme Court or by this Court sitting en banc. See United States v. Machado, 804 F.2d 1537, 1543 (11th Cir.1986).

id. at 89, 102 S.Ct. at 2880 (Rehnquist, J., joined by O'Connor, J., concurring in the judgment); 28 U.S.C.A. § 152(a)(1) (West Supp. 1989) (appointment of bankruptcy judges by Courts of Appeals for 14-year terms). It thus appears that the bankruptcy court below lacked jurisdiction to award fees under the EAJA.

The jurisdictional provisions of the Bankruptcy Code nevertheless suggest two possible methods by which a bankruptcy court might validly entertain an EAJA application. The 1984 amendments to the Code responded to the constitutional problems created by the bankruptcy courts' non-Article III status[8] by dis-

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[8]The Supreme Court in Northern Pipeline struck down under Article III of the 1978 Bankruptcy Code's grant of jurisdiction to the bankruptcy courts over all cases arising under, or related to cases arising under, the bankruptcy laws, at least insofar as the Code authorized the bankruptcy courts to adjudicate traditional state-law contract claims arising in relation to bankruptcy proceedings. See 458 U.S. at 70-76, 87 n. 40, 102

tinguishing between "core" and "non-core" proceedings, the latter being proceedings outside the scope of bankruptcy law as such. See 28 U.S.C.A. § 157 (West Supp. 1989). The assumption underlying the 1984 amendments is that Article III is not violated by the resolution of "core" bankruptcy proceedings in the non-Article III bankruptcy courts.[9] While the Trus-

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S.Ct. at 2871-74, n. 40 (plurality), 89-92 (concurrence).

[9]That assumption is open to serious question. While Supreme Court dicta in two cases following Northern Pipeline seemed to take a narrow view of that decision, see Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 584, 105 S.Ct. 3325, 3334, 87 L.Ed.2d 409 (1985); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851-53, 106 S.Ct. 3245, 3256-58, 92 L.Ed.2d 675 (1986), the Court's more recent decision in Granfinanciera, S.A. v. Nordberg, ___ U.S. ___, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989), appeared to adopt the analysis of the Northern Pipeline plurality, and cast doubt on the constitutionality of the bankruptcy courts' authority, under § 157(b), to adjudicate certain "core" proceedings without the parties' consent. Granfinanciera held that a defendant who has not submitted a claim against a bankruptcy estate has a Seventh Amendment

tee's underlying action in this case was a core proceeding, see id. § 157(b)(2)(F), (O), his application for EAJA fees clearly is not. "If the proceeding does

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right to jury trial in a fraudulent-conveyance action brought by a trustee. The Court also strongly suggested--although it specifically avoided holding--that fraudulent-conveyance and voidable-preference actions under 11 U.S.C.A. §§ 547-48 are "private-right" claims which "must be tried under the auspices of an Article III court." 109 S.Ct. at 2796; see generally id. at 2794-98, 2802. The Courts of Appeals have generally held to the contrary. See, e.g., In re Manville Forest Products Corp., 896 F.2d 1384 (2d Cir.1990); In re Harbour, 840 F.2d 1165, 1167-71 (4th Cir.1988), vacated and remanded in light of Granfinanciera, ___ U.S. ___, 109 S.Ct. 3234, 106 L.Ed.2d 582 (1989); In re Mankin, 823 F.2d 1296, 1306-10 (9th Cir.1987), cert. denied, 485 U.S. 1006, 108 S.Ct. 1468, 99 L.Ed.2d 698 (1988); In re Arnold Print Works, Inc., 815 F.2d 165, 169-71 (1st Cir.1987); see also In re Committee of Unsecured Creditors of F S Communications Corp., 760 F.2d 1194, 1199 (11th Cir.1985) (upholding Emergency Rule promulgated to govern bankruptcy proceedings between Northern Pipeline and 1984 Bankruptcy Amendments, and holding that voidable-preference actions "involve[] federally-created rights" subject to non-Article III adjudication). This difficult issue is not raised in this case, and so, of course, we express no view as to its merits.

not involve a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy it is not a core proceeding; it may be <u>related</u> to the bankruptcy because of its potential effect, but under section 157 (c)(1) it is an 'otherwise related' or noncore proceeding." <u>Matter of Wood</u>, 825 F.2d 90, 97 (5th Cir.1987) (Wisdom, J.) (emphasis in original).

Section 157(c)(1), however, provides that

> [a] bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district court after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

Consideration of an EAJA application by a

bankruptcy court under this procedure would not raise any problem under Bowen because the Article III district court, not the bankruptcy court, would ultimately determine the merits of the application and award the fees.[10] While FmHA attempts a rather strained argument that the bankruptcy and district court decisions below should be viewed as having followed the section 157(c)(1) procedure, it is clear that the proceedings below cannot be so characterized. The bankruptcy court's September 23, 1988 judg-

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[10] Section 157(c)(1) is modeled after 28 U.S.C.A. § 636(b)(1) (West Supp.1989), which authorizes hearings and proceedings before federal magistrates subject to de novo review by the district court of the magistrate's proposed findings and recommendations. The Supreme Court upheld § 636(b)(1) against Article III challenge in United States v. Raddatz, 447 U.S. 667, 681-84, 100 S.Ct. 2406, 2415-17, 65 L.Ed.2d 424 (1980). See also Jeffrey S. v. Jeffrey S. v. Georgia State Board of Education, 896 F.2d 507, 512 (11th Cir.1990) (de novo review by Article III court essential to constitutionality of § 636(b)(1)).

ment is by it own terms an "ORDER" and states that "it is hereby ORDERED that the Defendant [FmHA] shall pay to the Trustee [the awarded] fees." The district court's March 2, 1989 judgment is styled on "OPINION AND ORDER ON APPEAL," states that "the Bankruptcy Court entered an order on September 23, 1988 ... and this is an appeal by [FmHA] from that order," and concludes that "the appeal is denied." It is thus clear that the bankruptcy and district courts below were following the appeal procedure of 28 U.S.C.A. § 158 (West Supp.1989).[11]

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[11] While it might seem odd that FmHA, having raised the jurisdictional argument, would then contend that the proceedings below were nevertheless proper under § 157(c)(1), there is method to FmHA's madness. FmHA contends that because the bankruptcy court lacked jurisdiction to enter any final judgment, the district court was therefore obligated to conduct de novo review of the bankruptcy court's conclusions that FmHA's position was not substantially justified and that special circumstances did not render an EAJA award unjust. FmHA argues that the district court in fact engaged in such

This brings us to the second potential method by which the bankruptcy court might have considered this EAJA application. Section 158 provides for appellate review by the district court of "final judgments, orders, and decrees" of the bankruptcy court, id., § 158(a), "in the same manner as appeals in civil proceed-

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review, and that its expressed opinions on those issues--opinions favorable to FmHA's position--constitute de novo findings reversing those of the bankruptcy court. Therefore, FmHA contends, it is the district court's opinionated dicta on those issues--not the bankruptcy court's findings based on the February 25, 1988 hearing--to which this Court owes deference under the applicable "abuse of discretion" standard of review. See Pierce v. Underwood, 487 U.S. 552, 108 S.Ct. 2541, 2547, 101 L.Ed.2d 490 (1988). While its argument is somewhat ingenious, we find it unavailing. Regardless of whether the district court should have conducted de novo review of the bankruptcy court's findings, it simply did not do so. If, as FmHA contends, the bankruptcy court lacked jurisdiction to enter the final judgment which it did--and which the district court affirmed in an application of traditional appellate review--our only recourse is to vacate the judgments below. We may not, as FmHA urges, engage in an implausible post hoc reconstruction of events.

ings generally are taken to the courts of appeals," id., § 158(c). See In re Sublett, 895 F.2d 1381, 1383-84 (11th Cir. 1990). The bankruptcy courts are authorized to enter final judgments, subject to appellate review under section 158, in "core proceedings" under section 157(b) and under the consensual referral provision of section 157(c)(2), which provides that "the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 [i.e., a non-core proceeding] to a bankruptcy judge." The EAJA application in this case is unquestionably "related" to the underlying core proceeding. Because the very purpose of section 157(c)(2) is to authorize adjudication by the bankruptcy courts of proceedings otherwise reserved for Article III tribunals, it would appear that EAJA applications may properly be

adjudicated by bankruptcy courts pursuant to that section.[12] In the present case, however, the crucial element of consent

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[12] We note that § 157(c)(2), as part of the Bankruptcy Amendments of 1984, was enacted subsequent to the EAJA and this Court's decision in Bowen. Thus, despite the jurisdictional limitation of the EAJA as construed by Bowen, we find it appropriate to construe § 157(c)(2) as providing an additional jurisdictional forum for EAJA applications (as it does for a wide range of bankruptcy-related proceedings otherwise served to Article III courts), predicated upon consent. Section 157(c)(2) is modeled after the consensual referral provision of the Federal Magistrates Act, 28 U.S.C.A. § 636(c) (West Supp.1989), which this Court upheld against the Article III challenge in Sinclair v. Wainwright, 814 F.2d 1516, 1519 (11th Cir.1987). Accord Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 725 F.2d 537, 542-47 (9th Cir.) (en bank) (Kennedy, J.), cert. denied, 469 U.S. 824, 105 S.Ct. 100, 83 L.Ed.2d 45 (1984); see also Commodity Futures Trading Comm'n v. Schor, 478 U.S 833, 848, 106 S.Ct. 3245, 3255, 92 L.Ed.2d 675 (1986) ("as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver"). But cf. Schor, 478 U.S. at 850-51, 106 S.Ct. at 3256-57 (Article III also implies structural limitations which, in certain cases, may not be overcome by consent or waiver of the parties).

is lacking. The parties agree that at a pre-trial conference on August 25, 1983, FmHA consented to the bankruptcy court's jurisdiction over the underlying case on the merits. The consent clearly did not apply to the EAJA action, however, which was not actually commenced until January 1988 when the Trustee renewed his application.[13] Bankruptcy Rule 7012(b),

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[13] The transcript of the 1983 pre-trial conference is not contained in the record on appeal, but it is appended as an exhibit to the Trustee's brief before this Court. The record on appeal does contain FmHA's Answer to the Trustee's Amended Complaint, dated September 15, 1983, in which FmHA denied that it had consented to the bankruptcy court's jurisdiction, while conceding that it "ha[d] conceded that [the bankruptcy] court has the requisite power to enter orders and to render final, appealable decisions in accordance with the Emergency Reference Rule." Id. at 3. In any event, counsel for FmHA conceded at oral argument before this Court that FmHA had consented to the bankruptcy court's jurisdiction over the underlying action on the merits. As we have already noted, that action was clearly a core proceeding under the Bankruptcy Code. At the time of the 1983 conference, the bankruptcy court was operating under the Emergency Rule promulgated by district courts nationwide

effective as amended on August 1, 1987, provides that "[i]n non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties." (Emphasis added.)

For the foregoing reasons, the bankruptcy court lacked jurisdiction to award EAJA fees in this case.

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during the interregnum between the Supreme Court's Northern Pipeline decision and Congress's response to that decision in the 1984 Bankruptcy Amendments. See In re committee of Unsecured Creditors of F S Communications Corp., 760 F.2d 1194, 1199-1201 (11th Cir.1985) (appending text of Emergency Rule). Under the Emergency Rule, as under § 157 enacted in 1984, consent of the parties was required for the bankruptcy court to enter judgment in "related" (i.e., non-core) proceedings, but not in core proceedings "arising under" the Code. See Emergency Rule §§ (c)(1), (d)(3), 760 F.2d at 1199-1200. It appears from the transcript of the 1983 conference that FmHA conceded that the Trustee's action on the merits arose out of bankruptcy law and was not simply a "related" proceeding (and therefore did not require FmHA's consent), but that the bankruptcy court sought and received FmHA's consent to its jurisdiction so as to remove any doubt about its authority over the case.

B. The Trustee's Eligibility Under the EAJA

Because our holding on the jurisdictional issue would not preclude the Trustee from renewing his EAJA application before the district court, and because the district court has already faced and decided--albeit implicitly--the issue of the Trustee's eligibility to seek fees under the EAJA, it is appropriate for us to resolve that issue now.[14] The EAJA

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[14] There is no reason to believe that the district court would reach any conclusion on this issue of law different from that necessarily implied by its March 2, 1989 affirmance of the bankruptcy court's EAJA award. Because we review this issue of law de novo, no purpose would be served by awaiting the district court's reconsideration of it upon the Trustee's renewal of his application. On the other hand, because findings as to substantial justification and special circumstances under the EAJA--when made by a fee-awarding court with authority to do so--are subject only to deferential abuse of discretion review, see note 11, supra, the posture of this case precludes us from reaching those issues. Only the bankruptcy court--which we conclude lacked jurisdiction--has yet considered

defines a "party" eligible to seek attorney's fees as

> (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed[.]

28 U.S.C.A. § 2412(d)(2)(B). The Trustee argues that a bankruptcy estate fits within the meaning of the term "organization," and that, as the representative of the estate, he is entitled to seek fees under the EAJA. FmHA argues that a bankruptcy estate is not listed as an eligible party in the EAJA and cannot be shoe-horned into any of the other listed entities. We find surprisingly little guidance on this issue. No decision of

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those issues in the first instance.

this Court has addressed this issue, and few cases from any court even relate to it. One district court in this Circuit has declined to award EAJA fees to a bankruptcy estate, but only on the grounds that the litigation involved was not a "civil action" within the EAJA's meaning and that special circumstances made an award of fees unjust. See Flournoy v. Hershner, 68 B.R. 165, 172-73 (M.D.Ga.1986). The Fifth Circuit recently vacated and remanded an award of EAJA fees to a partnership, one of whose partners was in bankruptcy, in an action jointly brought by the partnership and the trustee of the bankrupt partner's estate; the court's vacatur and remand was not based on the identity of the parties and the court clearly contemplated that fees might be awarded on remand. See In re Estate of Lee, 812 F.2d 253, 256-57 (5th Cir.1987). Because

the Fifth Circuit did not discuss the bankruptcy-trustee eligibility issue, however, and because the EAJA explicitly authorizes an award of fees to a "partnership," we find this case to be of little help to our analysis.[15]

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[15] We find completely inapposite the case of Hoffman v. Heckler, 656 F.Supp. 1136 (E.D.Pa.1987), cited by the Trustee. The court in that case awarded EAJA fees to the representative of the estate of a deceased person. The "estate" in that situation represented the posthumous interests of an individual who was indisputably eligible to seek EAJA fees. The court concluded, sensibly enough, that "[p]recluding attorneys from receiving attorney's fees if their clients died before the filing of attorney's fees motions would discourage attorneys from representing sick people entitled to benefits." Id. at 1137. A bankruptcy estate is a completely different creature. The bankruptcy trustee does not represent the interests of the debtor alone; rather, he owes a complex set of obligations and fiduciary duties to the court, the debtor, the shareholders (in the case of a bankrupt corporation), and most importantly, the creditors. See Commodity Features Trading Comm'n v. Weintraub, 471 U.S. 343, 354-55, 105 S.Ct. 1986, 1993-94, 85 L.Ed.2d 372 (1985); Koch Refining v. Farmers Union Central Exchange, Inc., 831 F.2d 1339, 1342-43 (7th Cir.1987), cert. denied, 485 U.S. 906, 108 S.Ct. 1077, 99

The Trustee points to Black's Law Dictionary, which broadly defines an "organization" to include "a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity." Id. at 991 (5th ed. 1979).[16]

L.Ed.2d 237 (1988); In re WHET, Inc., 750 F.2d 149 (1st Cir.1984); In re Beck Industries, Inc., 725 F.2d 880, 888 (2d Cir. 1984).

[16] We note that the Third Circuit specifically declined to rely on this definition from Black's Law Dictionary in holding that the EAJA did not authorize fee awards to local governmental bodies. See Citizens Council of Delaware County v. Brinegar, 741 F.2d 584, 590-91 (3d Cir.1984); see also Commissioners of Highways v. United States, 684 F.2d 443, 445 (7th Cir.1982). Congress responded to those decisions in its 1985 amendments to the EAJA by specifically adding "unit[s] of local government" to § 2412(d)(2)(B). See P.L. 99-80, § 2(c)(1), 99 Stat. 183, 185. Because the eligibility of local governments under the EAJA raises somewhat unusual issues, we do not believe that it sheds much light on the question before us.

We believe, however, that the uncritical adoption of such a sweeping scope for the term "organization" would not be consistent with the principle that "waivers of sovereign immunity, as EAJA is, are to be construed narrowly and in favor of the sovereign." City of Brunswick v. United States, 849 F.2d 501, 503 n.4 (11th Cir. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1313, 103 L.Ed.2d 582 (1989); see also Library of Congress v. Shaw, 478 U.S. 310, 321, 106 S.Ct. 2957, 2965, 92 L.Ed.2d 250 (1986) (an expression of "the clear affirmative intent of Congress" is required "to waive the sovereign's immunity"). We believe the conception of an "organization" as "a group of people that has a more or less constant membership, a body of officers, [and] a purpose," see Webster's Third New International Dictionary 1590 (1976) (emphasis added), more probably captures Congress's

intent in drafting the EAJA, and comports more closely with a narrow construction of the EAJA's waiver of sovereign immunity.

We think it clear that a bankruptcy estate fits awkwardly, at best, within this conception. It is true, as the Trustee argues, that a bankruptcy trustee represents, in part, a group of creditors who share the common interest and purpose of recovering the maximum return on the debts owed to them. It is clear that the Trustee, in bringing the voidable-preference/equitable-subordination action against the FmHA in this case, was, generally speaking, "'standing in the shoes' of the creditors." See Koch Refining v. Farmers Union Central Exchange, Inc., 831 F.2d 1339, 1343 (7th Cir. 1987), cert. denied, 485 U.S. 906, 108 S.Ct. 1077, 99 L.Ed.2d 237 (1988). But the "organization" of creditors repre-

sented by a bankruptcy trustee in this sense is of a transient and limited nature. The "members" of the "organization" do not in fact necessarily share any particular ties or links, other than that the debtor owes them all money. Even their abstract common purpose of recovering what is owed to them will often mask, in reality, a set of violently competing individual interests. Indeed, "representing self-interested creditors has long been recognized" as perhaps the most "difficult aspect" of the bankruptcy trustee's duties. See id. As the Supreme Court has observed, "historically one of the prime purposes of the bankruptcy law has been ... to protect the creditors from one another." Young v. Higbee Co., 324 U.S. 204, 210, 65 S.Ct. 594, 597, 89 L.Ed. 890 (1945) (Black, J.); see also Koch Refining, 831 F.2d at 1343. This reality is reflected

in this very case, where FmHA, the defendant in the Trustee's action, was itself one of Davis's key creditors, and where FmHA has been adjudged guilty of misleading and inequitable conduct toward the other creditors.[17]

The transient nature of such an "organization" is reflected in the fact that it did not even exist prior to Davis's bankruptcy filing, and thus did not exist during the time FmHA was engaging in the conduct which was the subject matter of the lawsuit for which attorney's fees are now sought. The bankruptcy estate and the creditors represented by the Trustee simply do not seem to be the kind of "organization" which the average, reasonable person would envision as falling under a narrow, common-

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[17] Needless to say, FmHA's previously adjudicated conduct in this case has absolutely no bearing on our resolution of the issues presently before us.

sense definition of that narrow term. We find the "organization" in this case to be a far cry, for example, in terms of "constant membership" and common "purpose," from the Indian tribe found eligible in Hoopa Valley Tribe v. Watt, 569 F.Supp. 943, 945 (N.D.Cal.1983).[18]

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[18] We note that the one practical problem that would be created by the Trustee's extension of "organization" to include bankruptcy estates would be the difficulty of applying the EAJA's net-worth and number-of-employees limitations to the estate. See 28 U.S.C.A. § 2412(d)(2)(B)(ii). Even if we were inclined to accept the Trustee's expansive definition of "organization," we would certainly disagree with the bankruptcy court's holding that the Trustee satisfies the above limitations simply because the bankruptcy estate itself is (not surprisingly!) insolvent. See Davis, 91 B.R. at 632. As we have already noted, the Trustee in this case represented the interests of the creditors; it is therefore the creditors, as the "real parties in interest," whose characteristics would be relevant for purposes of EAJA eligibility. See American Ass'n of Retired Persons v. EEOC, 873 F.2d 402, 404-05 (D.C.Cir.1989); Unification Church v. INS, 762 F.2d 1077, 1081 (D.C.Cir.1985); see also 1 C.F.R. § 315.104(g) (1989) (Model Rules for Implementation of [the administrative version of the EAJA, 5 U.S.C.A. § 504] in Agency Proceedings)

In construing the scope of the definition of an eligible "party" under EAJA, we are not insensible to the con-

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("An [EAJA] applicant that participates in a proceeding primarily on behalf of one or more persons or entities that would be ineligible is not itself eligible for an award."). The bankruptcy court correctly noted that "[t]he real party in interest is the party who will pay the attorney fees if the government does not." Davis, 91 B.R. at 632 (citing Unification Church, 762 F.2d at 1082). But while a bankruptcy trustee's attorney's fees, as a matter of form, are generally paid out of the estate, that simply reduces the ultimate pay-out to the creditors. Thus, it is the creditors, in fact, who ultimately pay if attorney's fees are not awarded. To view the bankruptcy estate as such as the "real party in interest" is to stretch a legal fiction beyond the point of reason; the estate itself is merely a locus of property or monetary value against which the creditors have claims. The parties appear to agree that a number of Davis's creditors in this case, such as the Ford Motor Credit Co., the General Motors Acceptance Corp., and the John Deere Credit Corp., would likely fail the EAJA's net-worth and number-of-employees standards. It is unclear how the EAJA eligibility of a bankruptcy trustee would be determined where some creditors satisfied those standards and others did not. One virtue of a holding excluding bankruptcy trustees from the scope of EAJA eligibility, however, is that it obviates such an inquiry.

cerns which prompted Congress to enact that statute. As the Supreme Court recently noted, "Congress passed the EAJA in response to its concerns that persons 'may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights.'" Sullivan v. Hudson, ___ U.S. ___, 109 S.Ct. 2248, 2253, 104 L.Ed.2d 941 (1989). While the EAJA should thus be construed to vindicate its beneficial purposes, we believe that a definition of the term "organization" according to the conception discussed above appropriately balances those purposes with the principle requiring narrow construction of the EAJA as a waiver of sovereign immunity. Because a bankruptcy estate does not comfortably fit within that conception, we conclude that the Trustee is not an eligible "party" to

bring an EAJA application.

III. CONCLUSION

The bankruptcy court's award of fees under the EAJA was entered without jurisdiction. The judgments of the district and bankruptcy courts below are therefore VACATED. Furthermore, the Trustee may not renew his EAJA application in the district court because a bankruptcy trustee is not a "party" eligible to seek fees under the EAJA.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

IN RE:	*	
DAVID LARRY DAVIS,	*	BANKRUPTCY CASE NO. 81-60100-THOM
Debtor	*	
CHARLES A. GOWER, Trustee	*	ADVERSARY PROCEEDING NO. 82-6005-THOM
Plaintiff,	*	
vs.	*	CIVIL ACTION NO. 88-59-THOM
FARMERS HOME ADMINISTRATION,	*	
Defendant	*	

OPINION AND ORDER ON APPEAL

This bankruptcy case has been the subject of litigation in the Bankruptcy Court, in this Court, and in the Court of Appeals over a period of almost eight years, and it is apparent that the end is not yet.

In the latest development the Bankruptcy Court entered an order on September 23, 1988, directing the Farmers

Home Administration to pay the Trustee attorney fees and expenses under the Equal Access to Justice Act, 28 U.S.C. §2412(d) (hereinafter "EAJA"), and this is an appeal by the Farmers Home Administration from that order.

It is clear that EAJA provides in general for the recovery of attorney fees and expenses, but the Act also provides that the United States should not be held liable for such fees and expenses where "special circumstances make an award unjust." 28 U.S.C. §2412(d)(1)(A). The legislative history of the Act explains the meaning of this provision:

> This "safety valve" helps to insure that the government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the Court discretion to deny awards where equitable considerations dictate an award should not be made.

Presuming that the Trustee would

otherwise be entitled to an award, it is nevertheless this Court's view that the Bankruptcy Court erred in concluding that the agency's position was not substantially justified and in not concluding that special circumstances in this case preclude a recovery by the Trustee of attorney fees and expenses under EAJA. The most important special circumstance which the Bankruptcy Court should have considered was the Debtor's criminal conviction for fraud in obtaining and misusing federal loan funds that were the subject of the underlying litigation.

Having so said, however, this Court is mindful of the fact that when this Court held that the extensive fraud and subsequent criminal conviction of the Debtor warranted a forfeiture of the Debtor's claims, the Court of Appeals reversed the decision of this Court, stating that those were not matters for

proper consideration. In re Davis, Debtor, Charles A. Gower, Trustee vs. Farmers Home Administration, 785 F.2d 926 (11th Cir. 1986). And it is presumed that the Court of Appeals would likewise hold these factors would not constitute special circumstances precluding a recovery by the Trustee of attorney fees and expenses under EAJA. This being true, although it is the opinion of this Court that the appeal by Farmers Home Administration from the order of the Bankruptcy Court awarding attorney fees and expenses should be sustained and the Bankruptcy Court's order reversed, it would nevertheless be an exercise in futility for this Court to do so. Accordingly, the appeal is denied.

IT IS SO ORDERED this 28th day of February, 1989.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

IN RE:

DAVID LARRY DAVIS,

Debtor,

CASE NO.
81-60100-THOM

CHAPTER 7

CHARLES A. GOWER,
TRUSTEE,

Plaintiff,

ADVERSARY PROCEEDING

v.

NO. 82-6005-THOM

FARMERS HOME
ADMINISTRATION,

Defendant

CORRECTED MEMORANDUM OPINION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On November 13, 1984 this Court entered an Opinion and Judgment in favor of the Trustee in this case, Charles A. Gower, ordering Farmers Home Administration (hereinafter "FMHA") to return to the Debtor's estate $282,847.39 plus in-

terest and directing the Trustee to turn over to the estate an additional $52,327.07 plus interest held in escrow pending the outcome of the litigation. The Court found the money to be in part an illegal preference payment to FMHA under 11 U.S.C. §547(b) and (c)(5), and found FMHA's total claim to be subject to equitable subordination under 11 U.S.C. §510 because of FMHA's misconduct in obtaining the money. Those findings were affirmed by the District Court in an order dated November 5, 1986, and its decision was affirmed by the Court of Appeals for the Eleventh Circuit on September 23, 1987. Because the facts and conclusions on the merits of this Adversary Proceeding are stated in full in the Opinion of November 13, 1984, this Opinion will include only those facts necessary to the resolution of the instant request for attorney fees under 28 U.S.C.

§2412.

The Debtor in 1981 borrowed $985,000.00 from FMHA to finance his 1981 crop. FMHA prepared a "Farm and Home Plan" covering the Debtor's proposed disbursements for expenses and anticipated receipts from crops. It also directed the debtor to set up a supervised bank account which would require the signature of both an FMHA official and the Debtor to disburse funds. However, FMHA did not insist upon strict performance of the terms of the Farm and Home Plan. FMHA allowed payment from the supervised bank account in accordance with the debtor's bills as he brought them in. In some instances checks were simply endorsed by FMHA and delivered to the Debtor. FMHA took a crop lien on the Debtor's 1981 crops and filed security agreements and UCC-1 financing statements. The Debtor later expanded his 1981 operation with

rented farmland and obtained loans from other creditors, giving them crop liens. FMHA was aware that the Debtor had planted crops on other land than that on which FMHA held crop liens.

During the summer of 1981, FMHA reverted to strict compliance with the Farm and Home Plan. It began to retain part of the proceeds from the Debtor's crops. FMHA received crop proceeds as to which it was neither secured nor perfected from the rented properties. FMHA knew that it had no lien on these crops, but it notified all buyers of the Debtor's crops to make their checks out jointly, whether the crops came from properties with FMHA liens or not. FMHA made misleading statements to the Debtor's other creditors, leading them to believe that if they advanced services and supplies to allow the Debtor to harvest his crops, they would be paid from the crop pro-

ceeds. FMHA then retained the proceeds and did not pay the other creditors.

On November 16, 1981, the Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code. On February 12, 1982, the Trustee brought this Adversary Proceeding against FMHA to recover payments made to FMHA within 90 days prior to the Bankruptcy under 11 U.S.C. §547(b) and 11 U.S.C. §547(c)(5), for equitable subordination under 11 U.S.C. §510 of other sums paid to FMHA within 90 days of the bankruptcy, and to subordinate FMHA's claim to the claims of the unsecured creditors. FMHA asserted that it was exempt from those actions of the Trustee under the doctrine of the sovereign immunity and it moved to dismiss the case. This Court held that FMHA had waived sovereign immunity by asserting a claim in the case. In re Davis, 20 B.R. 519 (Bankr. M.D. Ga. 1982). FMHA

appealed that decision to the District Court, which upheld the decision of the Bankruptcy Court in an order dated October 22, 1982. FMHA then moved the District Court to certify the case for interlocutory appeal, and its motion was denied on February 28, 1983.

This case came on for trial on the merits on October 15, 1984. This Court held for the Trustee and found that FMHA had received preferential transfers and had engaged in misconduct requiring the equitable subordination of its claim. The Court also held that the Trustee does not simply stand in the shoes of the Debtor in an action to avoid preferential transfers. FMHA appealed the decision, and the District Court found that the Debtor had defrauded FMHA in obtaining the loan. It entered a summary judgment on July 10, 1985 dismissing the Trustee's claim under 28 U.S.C. §2514 as forfeited

because of the Debtor's fraud. This time the Trustee appealed, and the Eleventh Circuit Court of Appeals held that the Trustee's claims were for the benefit of the creditors and were not forfeited by the fraud of the Debtor. The case was remanded to the District Court for a ruling on the preference and equitable subordination findings. In re Davis, 785 F.2d 926 (11th Cir. 1986). On November 5, 1986, the District Court affirmed the Findings of Fact and Conclusions of Law of the Bankruptcy Court. This decision was affirmed by the Eleventh Circuit Court of Appeals in an unpublished decision on September 23, 1987.

The attorneys for the Trustee in this case filed an application for attorney fees under the Equal Access to Justice Act (hereinafter "EAJA") on December 12, 1984. A hearing was originally set on the application for March 12, 1985,

but was continued after the appeal of the Bankruptcy Court decision. After the final judgment in the matter, the Trustee again applied for attorney fees under EAJA on January 4, 1988. The Government objected. A hearing was held on February 25, 1988, and briefs were filed. There was an interim award of fees from the estate in this case on March 24, 1986 in the amount of $60,000.00 to Charles A. Gower, $30,000.00 to J. Patrick Ward, and $23,000.00 to T. Jefferson Loftiss, II. The Trustee agrees that any award of fees under EAJA would first be used to reimburse the estate for the previous fee award.

The Trustee's application requests attorney fees under EAJA at $150.00 per hour, with affidavits attached showing 812.35 hours for Mr. Gower, 747.73 hours for Mr. Ward, and 539.9 hours for Mr. Loftiss. He contends that special fac-

tors such as the limited availability of qualified attorneys and the length of the litigation warrant a higher rate than $75.00 per hour, and that bankruptcy is an "identifiable practice specialty" which was required in the case.

The United States objects to the fee application on several grounds. It contends that the Trustee is not eligible to recover under EAJA, since he has other means of compensation, that the Trustee has not shown a qualified net worth under EAJA, that the Trustee is not a prevailing party on some issues, that the Government was substantially justified in all of its agency actions and litigation positions, that there are special circumstances making an award unjust, that the trustee unduly prolonged the litigation, and that the fee application is inadequate.

The attorneys for the Trustee were

employed as authorized under 11 U.S.C. §327. The attorneys for the Trustee are seeking an award of attorney fees from the Government under 28 U.S.C. §2412(d), known as the Equal Access to Justice Act. Section 2412(d)(1)(A) provides as follows:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Section 2412(d)(1)(B) requires that an application for fees:

> show that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized

> statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

Section 2412(d)(2)(A) is on the amount of fees that will be allowed under EAJA: "The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that...attorney fees shall not be awarded in excess of $75.00 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified

attorneys for the proceedings involved, justifies a higher fee."

Section 2412(d)(2)(B) covers who may receive an award of fees under EAJA: "[P]arty means (i) an individual whose net worth did not exceed $2,000,000.00 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000.00 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed."

Subsection (D) defines "position of the United States" to include: "in addition to the position taken by the United States in this civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be

awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings...."

The purpose of EAJA was stated in §202 of Pub. L. 96-481, the 1980 amendments to EAJA. "(c) It is the purpose of this title (1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States...." Section 2412(d) became effective on October 1, 1981 and expired on October 1, 1984. It was reenacted "as if [it] had not been repealed" in 1985. Pub. L. No. 99-80, §6, 99 Stat. 183, 186 (1985). The 1985 amendments added the language including the action or failure to act by the agency upon which the civil action is based to the requirement that

the position of the United States be substantially justified.

The government has contended that the Trustee is not an eligible party to receive an award of attorney fees under §2412(d). Section 2412(d)(2)(B) included among eligible parties any association or organization with a net worth not exceeding $7,000,000.00. "Association" and "organization" are both broad terms. Black's Law Dictionary defines an organization as including "a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or other legal or commercial entity." Estates are included in that definition. The organization's net worth must not exceed $7,000,000.00 at the time the civil action is filed. If the real party in interest here is the estate, its

net worth is under the statutory amount, since the Chapter 7 estate was insolvent, except for the amounts recovered against the United States and others. The real party in interest is the party who will pay the attorney fees if the government does not. Unification Church v. I.N.S., 762 F.2d 1077, 1082 (D.C. Cir. 1985). Since the trustee's claims are for the benefit of the unsecured creditors, In re Davis, 785 F.2d 926, 927 (11th Cir. 1986), he is the proper party to proceed on behalf of the estate. Matter of First Colonial Corp., 544 F.2d 1291, 1297 (5th Cir. 1977). Since the estate is the real party in interest and the trustee and his attorneys have acted on its behalf, the possibility of an award of attorney fees from the estate does not prevent an award of fees under EAJA. A party's attorney is not denied fees under EAJA merely because the party is able to pay his attor-

ney. Duncan v. Poythress, 777 F.2d 1508, 1511 (11th Cir. 1985).[1]

No cases have held that a trustee cannot be awarded attorney fees under the Equal Access to Justice Act. Flournoy v. Hershner does not stand for that proposition and is distinguishable. The Trustee was not eligible for an award of attorney fees in that case because it was not a civil action as required by 28 U.S.C. §2412(d)(1)(A), but was an appeal of an administrative decision of the Bankruptcy Judge. Flournoy v. Hershner, 68 B.R. 165 (M.D. Ga. 1986). It was not an Adversary Proceeding brought by the Trustee in his representative capacity, as in this case.

One case has permitted the trustee of a bankruptcy estate to file an ap-

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[1]Duncan v. Poythress was decided under 42 U.S.C. §1988, but the standards for fee application are the same as in 28 U.S.C. §2412. Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40(1983).

plication under EAJA. In In re Estate of Lee, a partnership applied for attorney fees under EAJA, and the trustee of the bankruptcy estate of one of the partners was substituted for the partner as a plaintiff. The action was held to be property of the debtor's estate. Hill, Trustee of the Estate of Lee v. N.F.I.P., Case No. H-83-7013 (S.D. Tex., Jan. 23, 1986). The Fifth Circuit Court of Appeals reversed the District Court's decision on the amount of attorney fees, but did not hold that an award should have been denied or that the Trustee was not a proper party. In re Estate of Lee, 812 F.2d 253 (5th Cir. 1987). A debtor in bankruptcy has been awarded attorney fees under EAJA for a violation of the automatic stay by the Social Security Administration. In re Hagan, 44 B.R. 59 (Bankr. D.R.I. 1984). Other cases have awarded attorney fees under EAJA to the

representatives of decedents' estates. See Hoffman v. Heckler, 656 F.Supp. 1136 (E.D. Pa. 1987). Including bankruptcy estates and their representative trustees among the parties entitled to awards under EAJA furthers the intent of the statute of encouraging organizations to seek review of unreasonable governmental action. Precluding trustees would discourage them from recovering estate assets from government creditor agencies. The trustee is therefore an eligible party to recover attorney fees under EAJA.

The Trustee also meets the other threshold requirements under §2412. The Adversary Proceeding is a civil action, and the Trustee is a prevailing party in the litigation. A party "prevails" for EAJA purposes when "he or she has received substantially the relief requested or has been successful on the central

issue." Martin v. Heckler, 773 F.2d 1145, 1149 (11th Cir. 1985). The Trustee received substantially the relief he requested from the Bankruptcy Court, and that decision was eventually upheld by the District Court and the Court of Appeals. His loss on one count and the fact that he dropped some counts from his original complaint in his recast complaint do not prevent him from being a prevailing party.

28 U.S.C. §2412(d)(1)(A) states that "a court shall award to a prevailing party...fees...unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." The position of the United States includes "the action or failure to act by the agency upon the which the civil action is based...." The 1985 amendments including agency actions "shall apply to

cases pending on or commenced on or after the date of the enactment of this Act," August 5, 1985. Pub. L. No. 99-80, §7(a), 99 Stat. 183, 186. If the Court finds that the governments's original agency action was not substantially justified, it need not continue to inquire into the substantial justification of the government's litigation position. Russel v. National Mediation Bd., 775 F.2d 1284, 1291-92 (5th Cir. 1985). The government bears the burden of proof in showing that its position was substantially justified. Haitian Refugee Center v. Meese, 791 F.2d 1489, 1496 (11th Cir. 1986). It also has the burden of proving the existence of any special circumstances. Martin v. Heckler at 1150.

The United States Supreme Court has defined "substantially justified" as "justified in substance or in the main--that is, justified to a degree that could

satisfy a reasonable person." Pierce v. Underwood, ___ U.S. ___, No. 86-1512, slip op. at 12 (June 27, 1988). The Supreme Court stated that that standard was no different than the "reasonable basis both in law and fact" standard that the Eleventh Circuit Court of Appeals had been using. See Haitian Refugee Center at 1497. Whether or not the position of the United States was substantially justified is to be determined on the basis of the record made in the case. 28 U.S.C. §2412 (d)(1)(B). This Court's opinion on the merits make clear that FMHA's action was not substantially justified, and the government has presented no new evidence or arguments that would cause this Court to find otherwise. It found that FMHA knowingly collected proceeds from crops on which it had no lien, and that it made misleading statements to the debtor's other creditors to persuade

them to advance services and supplies to the debtor to allow him to harvest his crops. It specifically held that FMHA had engaged in inequitable conduct. This can hardly be considered substantially justified action by the government agency.

"[T]he fact that one other Court agreed or disagreed with the Government does not establish whether its position was substantially justified." Pierce, slip op. at 15. "The United States is not liable for the payment of fees and expenses merely because it lost. Neither is the United States exempted from the payment of fees and expenses merely because it prevailed at some point in the judicial process--before a magistrate or in the District Court, for example." Martin v. Heckler, 754 F.2d 1262, 1264 (5th Cir. 1985). The trustee originally lost in the District Court in this case,

but the Court did not reach the reasonableness of FMHA's actions in that decision.

The trustee is seeking a rate of $150.00 per hour. Section 2412 (d)(2)(A)(2) sets a top rate of $75.00 per hour "unless the Court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." The Court has not found the evidence presented on market rates and special factors to be very persuasive. The trustee presented affidavits from Thomasville attorneys indicating that their standard flat rate is around $75.00 per hour, but that a rate of $125.00 per hour or more should be appropriate in this case, and he submitted evidence of rates received by Atlanta attorneys in an uncontested fee application in the Middle

District of Georgia. The government presented a decision in which $50.00 per hour was awarded in a Middle District of Georgia case in 1985. The trustee presented no evidence of an increase in the cost of living.

The Supreme Court's opinion in Pierce v. Underwood discussed the $75.00 per hour cap set in the statute. The Supreme Court held that Congress had meant to limit EAJA fees to $75.00 per hour regardless of the prevailing market-rate and it limited special factors to those "not of broad and general application." Pierce, slip op. at 19. It found most special factors considered by the District Court to be too generally applicable. The factors that the District Court had considered in Pierce were taken from Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). The Eleventh Circuit has held that the John-

son factors are to be applied in calculating EAJA fee awards, Florida Suncoast Villas v. United States, 776 F.2d 974, 975 (11th Cir. 1985), although it had anticipated that Pierce would resolve the questions concerning the use of special factors in United States v. Prop. Located at 4880 S.E. Dixie Hwy., 838 F.2d 1558, 1566 (11th Cir. 1988). The general standards for setting fees in the Eleventh Circuit are now found in Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292 (11th Cir. 1988). Norman uses a lodestar approach based on a reasonable hourly rate of "the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." Id. at 1299. This reasonable hourly rate would be the market rate allowed in EAJA up to the $75.00 per hour cap. Norman, however,

still allows the use of the Johnson factors to determine the lodestar rate. Id. at 1299-1300.

Pierce has ruled out the use of most of the Johnson factors as special factors to be used in setting a rate in EAJA cases. Pierce, slip op. at 19. The unacceptable special factors included the novelty and difficulty of issues, the undesirability of the case, the work and ability of counsel, the results obtained, customary fees and awards in other cases, and the contingent nature of the fee. Id. Of the Johnson factors that Pierce did not consider, the time and labor required would determine the number of hours to award fees on, but would be of too broad and general application to use as special factors. The preclusion of other employment and the time limitations imposed are also probably too general to consider. As for experience and skills,

Pierce requires "some distinctive knowledge or specialized skill needful for the litigation in question--as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation. Examples of the former would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language." Id. While bankruptcy can be a specialty and is a distinct field of the law, all cases will involve skill in some area of the law. It is not the "identifiable practice specialty" that patent law is. The statute requires "limited availability of qualified attorneys for the proceedings involved." With the fairly strict standards set by the Supreme Court of "qualified for the proceedings involved in some specialized sense, rather than just in their general legal competence," this Court is not convinced that availability

of qualified bankruptcy attorneys was limited.

The cost of living adjustment to $75.00 an hour is measured from the original enactment date of EAJA in 1981. Baker v. Bowen, 839 F.2d 1075, 1084 (5th Cir. 1988). Cost of living evidence can be presented by using the Consumer Price Index published by the Bureau of Labor Statistics. See Garcia v. Schweiker, 829 F.2d 396, 401 (3d Cir. 1987); Faulkner v. Bowen, 673 F.Supp. 1549, 1551 (D. Or. 1987). The Trustee presented no evidence of an increase in the cost of living, except for a statement that the cost of living had obviously increased since 1981. This is not enough to justify an award at a higher rate than the statutory cap. Section 2412 (d)(2)(A) does not require an adjustment for cost of living. Baker at 1084. A footnote in Norman suggests that the Court should not allow an

applicant to supplement his fee application after hearing. Norman at 1303. The Court therefore holds that the appropriate rate in this case is $75.00 per hour.

The United States has objected that the trustee's fee application is inadequate. It objects that hours are undocumented and unsubstantiated, that there is duplication of hours, that fees are too high for travel and administrative matters, that the rate requested is too high, and that it is not itemized as to issues on which the trustee prevailed. The Court has determined that the rate will be limited to $75.00 per hour. The fee applicant bears the burden of establishing his entitlement to an award and of documenting the hours expended. Hensley v. Eckerhart at 437, 103 S. Ct. at 1941.

Bankruptcy Rule 2016 sets forth the requirements for bankruptcy fee awards

from the estate. It requires "an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested." The applicant must exclude excessive, redundant and otherwise unnecessary hours from the amount claimed. Hensley at 434, 103 S. Ct. at 1939-40; Norman at 1301. The Eleventh Circuit Court of Appeals in In re Beverly Mfg. Corp. required a statement which recites the number of hours worked and contains a description of how each of those hours was spent. Entries must not "lump" together different services in one time period. The descriptions of work done must be specific. In re Beverly Mfg. Corp., 841 F.2d 365, 370 (11th Cir. 1988).

Fees may not be awarded for work on unsuccessful, unrelated claims. Hensley at 435, 103 S. Ct. at 1940. However,

where "the lawsuit cannot be viewed as a series of discreet claims", and the issues are intertwined, the attorneys should be fully compensated for their work on the case as a whole. Haitian Refugee Center at 1500. The original claims in this case were not unrelated and were all based on the allegedly unreasonable actions of FMHA. Under these circumstances, the Court does not find that it is necessary to reduce the award for unsucessful [sic] claims.

No double recovery will be permitted and any award under EAJA must be used to reimburse the estate up to the amount previously awarded. Watford v. Heckler, 765 F.2d 1562, 1566 (11th Cir. 1985). Fees or time spent on the fee application and fee litigation may be awarded. Trichilo v. Secretary of H.H.S., 823 F.2d 702, 708 (2d Cir. 1987); Haitian Refugee Center v. Meese, 791 F.2d 1489, 1500

(11th Cir. 1986).[2] The Trustee agrees that no fees may be awarded for hours worked by the attorney whose employment was not authorized under Bankruptcy Rule 2014, Walter Van Heiningen. With a rate of $75.00 per hour, the Court does not feel that it needs to reduce fees for travel time. The statute specifically allows expenses to be awarded: "a court shall award to a prevailing party...fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action" §2412(d)(1)(A). Mr. Gower and Mr. Loftiss have submitted no evidence of expenses. Mr. Ward included his expenses in his affidavit, so he may be awarded expenses as approved by the Court.

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[2]"Fees for fees" were not awarded in Haitian Refugee Center under the circumstances of that particular case, but the Court did not hold that they would be denied in all cases. Haitian Refugee Center v. Meese, 804 F.2d 1573, 1574 (11th Cir. 1986).

Where an inadequate fee application is submitted, a Court is permitted to deny the application for fees entirely. Beverly Mfg. at 371. The Court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award. See Hensley at 436-37, 103 S. Ct. at 1041. The Court is not permitted to allow counsel to supplement the inadequate fee application after the hearing. Norman at 1303. The Court agrees with the United States that many hours in the fee applications are undocumented and unsubstantiated. All three affidavits lump together several items in a single entry. Entries are not detailed as to "the specific nature of each service performed and its relation to the Bankruptcy proceeding." Beverly Mfg. at 370. The Court cannot determine from the affidavits if there has been duplication, if hours were reasonably spent, or even

if they were spent on this adversary proceeding. At the hearing on these fee applications, however, extensive testimony was given on the reasonableness and purpose of hours expended. Specific items were questioned and explained.

As to Mr. Gower's application, the Court is satisfied that all hours listed were reasonably spent on this case. Mr. Gower in testimony explained many of his entries. The number of hours listed are reasonable for all the litigation and appeals involved in this case, the years the case has been pending, and the results obtained. The Court has compared all three affidavits with the hours listed in the earlier interim fee application, and it is satisfied that Mr. Gower has included no hours in this fee application having to do with the other adversary proceedings and other matters involved in this case. The Court will

therefore award to Mr. Gower fees for all hours listed at $75.00 per hour.

There are other problems with the affidavits submitted by Mr. Loftiss and Mr. Ward. They have apparently included hours that were actually spent on other aspects of the debtor's case. With the general lack of detail, it is impossible for the Court to determine specifically which hours were spent on the litigation with FMHA. There are some entries on each application that specifically say that time was spent on other cases. Examples in Mr. Loftiss' affidavit include an entry on July 17, 1982 of one and one-half hours on "review of Ford Motor Credit case, and an entry on August 6, 1984 of three-tenths of an hour for "telephone conversation from Jeff Loftiss in Columbus to Walter van Heiningen in Thomasville re: Pippin and Rodenberry cases." Mr. Ward's affidavit includes an

entry on August 30, 1983 for 8.5 hours of "travel to Columbus 160 x .20" and "conf. Charles Gower to file two law suits against Pippin and Rodenberry." Both applications attribute all telephone calls from the interim fee application that do not list a subject matter to the litigation with FMHA. Mr. Loftiss' affidavit on page 16 is a copy of a page from the interim fee application with some entries blanked out. All entries on that page in the interim fee application that list a subject matter indicate that they had to do with the Pippin and Rodenberry cases. The Court's docket sheet shows that the activities in the Davis case at that time had to do with the Pippin and Rodenberry adversary proceedings. However, all telephone conversations entries from that page of the interim fee application were included in the fee application for fees under EAJA.

Most of the pages in Mr. Loftiss' interim fee application were transferred directly without subtractions into this fee application. Mr. Loftiss' application also includes entries that say they are for time spent by Walter Van Heiningen, who is not authorized as an attorney for the trustee in this case. Examples are on pages 8 and 10 of Mr. Loftiss' affidavit. The Court has no way of knowing how many other hours in this fee application were actually expended by Mr. Van Heiningen. Of 579.2 hours in the interim fee application Mr. Loftiss' claims to have spent 483.9 hours on FMHA litigation, calculated through February 13, 1986, even though there were six other adversary proceedings in this case, two of which also involved appeals. Mr. Ward's interim fee application ostensibly removed hours not related to the litigation with FMHA. His original EAJA application

included entries from other cases with the hours bracketed and subtracted out. The interim fee application, for reasons unknown to the Court, blanked out those bracketed hours and requested fees only for the hours listed as related to FMHA. This fee application once again lists the entries on other cases with the hours bracketed out. However, the application does not actually exclude all hours related to other cases. Mr. Ward's interim fee application claims that of 731.1 total hours, 691.13 were spent on the FMHA litigation. Mr. Ward's affidavit includes several entries that say they are related to the other cases. Page 28 includes 1.5 hours reviewing the record in Pippin on the day before the Pippin pre-trial conference. The pre-trial itself was subtracted out, but the review of the record was not. Most pages have no subtractions for work on other cases

at all. Most entries, especially the telephone calls, do not list the subject matter at all, so that the Court cannot determine which hours were actually spent on the litigation with FMHA. The problems are the same with his entries for expenses.

Under the authority of Beverly Manufacturing, the Court could deny the awards altogether to these two attorneys. Beverly Mfg. at 371. However, this would mainly serve to penalize the estate and to provide a windfall to FMHA. A large number of the hours listed in the fee application obviously were spent on the FMHA case. The Court therefore has gone over the fee applications and will award fees only for hours clearly spent on the FMHA case. These include entries that specifically mention FMHA or its attorneys, hours on activities such as hearings or preparations for filing of items

like motions that the Court's docket sheet shows were on FMHA matters, and all time spent on the case after the last other adversary proceeding was concluded on January 10, 1986. Most of the entries subtracted are several pages of entries telephone calls with no subject matter listed.

Mr. Ward's expenses are treated the same way. Only expenses clearly related to this case are included in the Court's award. Some of the travel expenses and most of the long-distance telephone calls are excluded because the Court cannot determine if they are for work on the FMHA case. Some of his entries as listed would seem to involve no expense, such as $175.00 on January 2, 1982 for a conference "re records." There is no mention of travel involved. Expenses like these have not been included. He has also included expenses that are listed next to

hours he bracketed and subtracted; examples are on pages 23 and 24 of his affidavit.

The amounts to be awarded are calculated as follows:

Charles A. Gower:

812.35 hours on FMHA
x75.00

$60,926.25 EAJA fee award

previous fee award: $60,000.00
hours up to hearing on interim fee award (entries through 1/31/86): 1160.34

hours on FMHA through 1/31/86 last entry 9/2/85): 593.35
593 divided by 1160.34 = .5113 (percentage of time on FMHA)

$60,000.00
x .5113

$30,678.00

$30.678.00 of the EAJA fee award goes into the estate to reimburse it for the time in the first fee award spent on the FMHA litigation. This prevents a double recovery.

$30,248.25 of the EAJA fee award goes to Mr. Gower for time spent on the FMHA litigation that has not yet been reimbursed.

T. Jefferson Loftiss II:

FMHA hours claimed: 539.9
FMHA hours allowed: 337.3
337.3 hours on FMHA
x75.00

$25,297.50 EAJA fee award

interim fee award: $23,000.00
hours up to hearing on interim fee award (entries through 2/13/86): 579.2
allowed hours on FMHA through 2/13/86: 281.3
281.3 divided by 579.2 = .4856 (percentage of time on FMHA)
$23,000.00
x .4856

$11,168.80

$11,168.80 of the EAJA fee award goes into the estate to reimburse it for the time in the first fee award spent on the FMHA litigation. $14,128.70 goes to Mr. Loftiss for time spent on the FMHA litigation that has not yet been reimbursed.

J. Patrick Ward:

hours claimed on FMHA: 747.73
hours on FMHA allowed: 352.2
352.2 hours on FMHA
x75.00

$26,415.00 EAJA fee award

expenses claimed on FMHA: $2,422.15
expenses on FMHA allowed: $ 631.56
interim fee award: $30,000.00

hours up to hearing on interim fee

award (entries through 3/14/86): 691.13 (Since only FMHA entries were shown on the applications, the Court based its interim fee award only on the FMHA total shown, not on the total hours shown.)

allowed hours on FMHA through 3/14/86: 321.5

321.5 divided by 691.13 = .4652 (percentage of time on FMHA)

$30,000.00
x .4652

$13,956.00

$13,956.00 of the EAJA fee award goes into the estimate to reimburse it for the time spent on the FMHA litigation.
$12,459.00 goes to Mr. Ward for time spent on the FMHA litigation that has not yet been reimbursed along with the award of $631.56 for expenses

Accordingly, the Court finds that the attorneys for the trustee are entitled to an award of fees under 28 U.S.C. §2412(d). The Court has determined that Charles A. Gower is entitled to an award of $60,926.25, T. Jefferson Loftiss, II is entitled to an award of $25,297.50 and J. Patrick Ward is en-

titled to an award of $26,415.00 for fees and $631.56 for expenses. The applicants are hereby awarded attorneys fees in the amount of $112,638.75 and expenses in the amount of $631.56, to be paid by the United States.

An Order in accordance with this opinion will be entered separately.

DATED this 23rd day of September, 1988.

JOHN T. LANEY, III
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

I, Cheryl Kleven, certify that a copy of the attached and foregoing has been mailed to the following:

Ms. Lillian H. Lockary
Asst. U. S. Attorney
P. O. Box U
Macon, Georgia 31202

Mr. T. Jefferson Loftiss, II
Attorney at Law
P. O. Box 1935
Thomasville, Georgia 31792

Mr. J. Patrick Ward
Attorney at Law
P. O. Box 618
Cairo, Georgia 31728

Mr. Charles A. Gower
Chapter 7 Trustee
P. O. Box 5509
Columbus, Georgia 31906

This 23rd day of September, 1988.

_____
Cheryl Kleven - Deputy Clerk
United States Bankruptcy Court